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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ZSCAQULINE C. MASERANG,
12 Plaintiff,
13 v.
14 CAROLYN W. COLVIN, Acting
15 Commissioner of Social Security,
16 Defendant.
17

Case No.: 16cv2098-BAS-MDD

**REPORT AND
RECOMMENDATION ON CROSS
MOTIONS FOR SUMMARY
JUDGMENT**

[ECF Nos. 16, 19]

18 Plaintiff Zscaquline C. Maserang (“Plaintiff”) filed this action pursuant
19 to 42 U.S.C. § 405(g) for judicial review of the decision of the Commissioner of
20 the Social Security Administration (“Commissioner”) denying Plaintiff’s
21 application for disability benefits under Title II of the Social Security Act and
22 supplemental security income payments under Title XVI of the Social
23 Security Act. Plaintiff moves the Court for summary judgment reversing the
24 Commissioner and ordering an award of benefits, or, in the alternative, to
25 remand the case for further administrative proceedings. (ECF No. 16).
26 Defendant moved for summary judgment affirming the denial of benefits.
27 (ECF No. 19).

1 For the reasons expressed herein, the Court recommends that the case
2 be **REMANDED** to the ALJ for further proceedings.

3 **I. BACKGROUND**

4 Plaintiff alleges that she became disabled on May 17, 2011. (A.R. 176,
5 182).¹ Plaintiff's date of birth, November 2, 1973, categorizes her as a
6 younger person on the alleged disability onset date. 20 C.F.R. §§ 404.1563,
7 416.963; (A.R. 28).

8 **A. Procedural History**

9 On January 17, 2013, Plaintiff filed an application for social security
10 disability insurance benefits, and on January 31, 2013, Plaintiff filed an
11 application for supplemental security income. (A.R. 21). Plaintiff had
12 previously filed for disability insurance benefits and supplementary security
13 income on November 5, 2008. (A.R. 62). Administrative Law Judge ("ALJ")
14 David L. Wurzel denied those claims on May 16, 2011. (A.R. 59-73). On
15 December 13, 2011, the Appeals Council denied Plaintiff's request for review
16 of the ALJ's decision. (A.R. 78).

17 Plaintiff's January 2013 claims were initially denied on May 17, 2013,
18 and denied upon reconsideration on October 3, 2013. (*Id.*). On September 19,
19 2014, Plaintiff appeared at a hearing in San Diego, California, before ALJ
20 Jay Levine. (A.R. 36). Plaintiff and impartial vocational expert Harlan S.
21 Stock testified. (A.R. 21).

22 On January 14, 2015, the ALJ issued a written decision finding Plaintiff
23 not disabled. (A.R. 21, 29). Plaintiff appealed, and the Appeals Council
24 declined to review the ALJ's decision. (A.R. 1). Consequently, the ALJ's
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26 ¹ "A.R." refers to the Administrative Record filed on November 21, 2016, and
27 is located at ECF No. 11.

1 decision became the final decision of the Commissioner. (*Id.*).

2 On August 18, 2016, Plaintiff filed a Complaint with this Court seeking
3 judicial review of the Commissioner's decision. (ECF No. 1). On November
4 21, 2016, Defendant answered and lodged the administrative record with the
5 Court. (ECF Nos. 10, 11). On April 17, 2017, Plaintiff moved for summary
6 judgment. (ECF No. 16). On May 16, 2017, the Commissioner cross-moved
7 for summary judgment. (ECF No. 19). Plaintiff did not reply to the
8 Commissioner's response.

9 **II. DISCUSSION**

10 **A. Legal Standard**

11 The supplemental security income program provides benefits to
12 disabled persons without substantial resources and with little income. 42
13 U.S.C. § 1382. To qualify, a claimant must establish an inability to engage in
14 "substantial gainful activity" because of a "medically determinable physical
15 or mental impairment" that "has lasted or can be expected to last for a
16 continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A).
17 The disabling impairment must be so severe that, considering age, education,
18 and work experience, the claimant cannot engage in any kind of substantial
19 gainful work that exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

20 The Commissioner makes this assessment through a process of up to
21 five steps. First, the claimant must not be engaged in substantial, gainful
22 activity. 20 C.F.R. § 416.920(b). Second, the claimant must have a "severe"
23 impairment. 20 C.F.R. § 416.920(c). Third, the medical evidence of the
24 claimant's impairment is compared to a list of impairments that are
25 presumed severe enough to preclude work. 20 C.F.R. § 416.920(d). If the
26 claimant's impairment meets or is equivalent to the requirements for one of
27 the listed impairments, benefits are awarded. *Id.* If the claimant's

1 impairment does not meet or is not equivalent to the requirements of a listed
2 impairment, the analysis continues to a fourth and possibly fifth step and
3 considers the claimant's residual functional capacity. At the fourth step, the
4 claimant's relevant work history is considered with the claimant's residual
5 functional capacity. If the claimant can perform the claimant's past relevant
6 work, benefits are denied. 20 C.F.R. § 416.920(e). At the fifth step, if the
7 claimant is found unable to perform the claimant's past relevant work, the
8 issue is whether the claimant can perform any other work that exists in the
9 national economy, considering the claimant's age, education, work
10 experience, and residual functional capacity. If the claimant cannot do other
11 work that exists in the national economy, benefits are awarded. 20 C.F.R. §
12 416.920(f).

13 Sections 405(g) and 1383(c)(3) of the Social Security Act allow
14 unsuccessful applicants to seek judicial review of a final agency decision of
15 the Commissioner. 42 U.S.C. §§ 405(g), 1383(c)(3). The scope of judicial
16 review is limited and the Commissioner's denial of benefits "will be disturbed
17 only if it is not supported by substantial evidence or is based on legal error."
18 *Browner v. Secretary of Health & Human Services*, 839 F.2d 432, 433 (9th
19 Cir. 1988) (quoting *Green v. Heckler*, 803 F.2d 528, 529 (9th Cir. 1986)).

20 Substantial evidence means "more than a mere scintilla" but less than a
21 preponderance. *Sandqathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997). "[I]t
22 is such relevant evidence as a reasonable mind might accept as adequate to
23 support a conclusion." *Id.* (quoting *Andrews v. Shalala* 53 F.3d 1035, 1039
24 (9th Cir. 1995)). The court must consider the record as a whole, weighing
25 both the evidence that supports and detracts from the Commissioner's
26 conclusions. *Desrosiers v. Secretary of Health & Human Services*, 846 F.2d
27 573, 576 (9th Cir. 1988). If the evidence supports more than one rational

1 interpretation, the court must uphold the ALJ's decision. *Allen v. Heckler*,
2 749 F.2d 577, 579 (9th Cir. 1984). When the evidence is inconclusive,
3 "questions of credibility and resolution of conflicts in the testimony are
4 functions solely of the Secretary." *Sample v. Schweiker*, 694 F.2d 639, 642
5 (9th Cir. 1982).

6 The ALJ has a special duty in social security cases to fully and fairly
7 develop the record in order to make an informed decision on a claimant's
8 entitlement to disability benefits. *DeLorme v. Sullivan*, 924 F.2d 841, 849
9 (9th Cir. 1991). Because disability hearings are not adversarial in nature,
10 the ALJ must "inform himself [or herself] about the facts relevant to his
11 decision," even if the claimant is represented by counsel. *Id.* (quoting *Heckler*
12 *v. Campbell*, 461 U.S. 458, 471 n.1 (1983)).

13 Even if a reviewing court finds that substantial evidence supports the
14 ALJ's conclusions, the court must set aside the decision if the ALJ failed to
15 apply the proper legal standards in weighing the evidence and reaching his or
16 her decision. *Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir. 1978). Section
17 405(g) permits a court to enter a judgment affirming, modifying or reversing
18 the Commissioner's decision. 42 U.S. C. § 405(g). The reviewing court may
19 also remand the matter to the Social Security Administration for further
20 proceedings. *Id.*

21 **B. The ALJ's Decision**

22 The ALJ concluded Plaintiff was not disabled, as defined in the Social
23 Security Act, from May 17, 2011, through the date of the ALJ's decision,
24 January 14, 2015. (A.R. 29). The ALJ also found Plaintiff did not show
25 changed circumstances sufficient to overcome the presumption of
26 nondisability from the previous ALJ decision on May 16, 2011. (A.R. 22).

27 The ALJ found Plaintiff has the following severe impairments:

1 polyarthralgia; arthritis; chondromalacia patellar, bilateral knees;
2 fibromyalgia; obesity; degenerative disc disease (“DDD”) and joint disease,
3 lumbar and cervical spine; and hypertension. (A.R. 24). The ALJ determined
4 that Plaintiff did not have an impairment or combination of impairments
5 meeting or medically equivalent to the severity of one of the listed
6 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§
7 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926). (A.R. 25).
8 Specifically, the ALJ found that “[n]o treating or examining physician has
9 recorded findings equivalent in severity to the criteria of any listed
10 impairment, nor does the evidence show medical findings that are the same
11 or equivalent to those of any listed impairment of the Listing of
12 Impairments.” (*Id.*). The ALJ considered listings 1.02, 1.03, 1.04, 4.00 and
13 14.09.

14 The ALJ found that Plaintiff has the residual functional capacity
15 (“RFC”) to:

16 [P]erform light work . . . except [Plaintiff] can lift and/or carry 20
17 pounds occasionally and 10 pounds frequently; [Plaintiff] can stand
18 and/or walk 2 hours in an 8-hour workday, in ½ hour intervals;
19 [Plaintiff] can sit 6 hours in an 8-hour workday; [Plaintiff] cannot
20 push and/or pull with either leg; [Plaintiff] cannot work around
21 unprotected heights, temperature extremes, and vibration;
22 [Plaintiff] cannot walk on uneven ground; [Plaintiff] cannot climb
23 ladders, but she can occasionally climb stairs and ramps; [Plaintiff]
24 can occasionally stoop and bend; [Plaintiff] cannot balance;
[Plaintiff] can perform frequent handling and fine fingering;
[Plaintiff] cannot perform power gripping and/or grasping with
either hand; and [Plaintiff] can occasionally lift above shoulder
level.

25 (A.R. 25). After reviewing the record and Plaintiff’s testimony, the ALJ found
26 that Plaintiff’s “medically determinable impairments could reasonably be
27 expected to cause the alleged symptoms; however, [Plaintiff’s] statements

1 concerning the intensity, persistence and limiting effects of these symptoms
2 are not entirely credible.” (A.R. 26).

3 Relying on the record and testimony of vocational expert (VE) Harlan S.
4 Stock, the ALJ found that Plaintiff is unable to perform any past relevant
5 work. (A.R. 28). The ALJ stated that the record reflects that Plaintiff
6 worked as a preschool teacher. (*Id.*). VE Stock testified that this position
7 requires an exertional level that Plaintiff could not perform at her current
8 functional capacity. (A.R. 55).

9 The ALJ found that there are jobs that exist in significant numbers in
10 the national economy that Plaintiff can perform. (A.R. 28). In determining
11 this, the ALJ considered Plaintiff’s RFC; that Plaintiff has a Master’s degree
12 in human services, can communicate in English, and is a “younger
13 individual;” and that transferable job skills are immaterial. (A.R. 26, 28).
14 Based on this information, VE Stock testified that Plaintiff can perform
15 occupations such as dresser, election clerk, and call out operator. (A.R. 29).
16 Accordingly, the ALJ found Plaintiff was not disabled from May 17, 2011, to
17 the date of the ALJ decision, January 14, 2015. (A.R. 29-30).

18 In determining that Plaintiff is not disabled, the ALJ noted the
19 following to be of particular relevance:

20 **1. Plaintiff’s Testimony**

21 At the hearing, Plaintiff testified that she was divorced with three
22 children, ages 19, 21, and 8. (A.R. 26). Plaintiff lived with her 8-year-old
23 daughter. (*Id.*). Plaintiff testified that she was hospitalized due to
24 rheumatoid arthritis and swelling in her legs, and also complained of
25 worsening back and joint pain. (*Id.*). For insurance reasons, Plaintiff was
26 unable to get an MRI. (*Id.*).

27 Plaintiff testified that she could not work because it was difficult to

1 stand on her feet, and she had difficulties with daily activities like washing
2 her hair and walking around her complex. (*Id.*). She complained of extreme
3 joint pain and swelling and numbness in her knees and legs. (*Id.*). Plaintiff
4 mostly tried to walk without a cane, but sometimes used one. (*Id.*).

5 The ALJ found that Plaintiff's allegations regarding the severity of her
6 symptoms and limitations are greater than expected in light of the objective
7 evidence of record. (A.R. 27).

8 **2. Plaintiff's 2011-2014 Medical Record**

9 On August 8, 2011, Plaintiff attended a rheumatology consultation with
10 Michael Keller, M.D. (A.R. 299-301). Dr. Keller evaluated Plaintiff and
11 diagnosed her with degenerative disease, osteoarthritis polyfocal, and
12 fibromyalgia. (A.R. 301). Plaintiff had negative Antinuclear Antibody²
13 ("ANA") testing, which resulted in no diagnosis of rheumatoid arthritis. Dr.
14 Keller gave Plaintiff a trial of Lyrica and advised her on the importance of
15 diet and exercise. (*Id.*).

16 On August 31, 2012, Plaintiff complained of generalized myalgia and
17 arthralgia to King Chavez Health Center. (A.R. 318, 336). Plaintiff also
18 reported at that time that her rheumatologist felt Plaintiff had rheumatoid
19 arthritis. (A.R. 318).

20 On January 28, 2013, Plaintiff's cervical spine x-ray indicated she had
21 mild DDD at C6-7 without abnormal motion. (A.R. 371). On March 3, 2013,
22 Plaintiff's screening for rheumatoid arthritis showed elevated inflammatory
23 markers, but her ANA was negative. (A.R. 357). Plaintiff was diagnosed
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26 ² ANA testing assists in screening for autoimmune disorders. *Whitendale v.*
27 *Astrue*, No. 1:10-cv-01561-SKO, 2012 WL 652646, at *1 n.6 (E.D. Cal. Feb. 28,
2012) (citing to <https://medlineplus.gov/ency/article/003535.htm>).

1 with “likely” rheumatoid arthritis, unspecified myalgias and myositis,
2 unspecified generalized osteoarthritis, Raynaud’s syndrome, and mild
3 degenerative joint disease in the cervical spine. (*Id.*). Plaintiff evidenced
4 inflammation in her joints and skin with elevated inflammation markers, but
5 negative serologies. (*Id.*). On August 14, 2013, Dr. Roshan, a treating
6 physician, indicated that Plaintiff continued to have inflammatory arthritis
7 with elevated inflammatory markers, but that her ANA by
8 immunofluorescence was negative. (A.R. 392). Plaintiff had less swelling in
9 her hands, but still had significant pain in her joints and had prolonged
10 morning stiffness. (*Id.*). Dr. Roshan treated Plaintiff with Methotrexate,
11 authorized her to try Humira, and advised Plaintiff to lose weight. (*Id.*).

12 On May 16, 2014, Dr. Roshan reported that Plaintiff continued to have
13 inflammatory arthritis, fibromyalgia, and connective tissue condition, which
14 were treated with Methotrexate and shoulder injections. (A.R. 401). Dr.
15 Roshan treated Plaintiff’s cervical stenosis with Gabapentin, treated her
16 fatigue with folate and B12, and counseled Plaintiff on weight loss and
17 exercise. (*Id.*).

18 **3. Dr. Close, Consultative Examiner**

19 The ALJ gave great weight to consultative examiner Frederick Close,
20 M.D., a Board certified orthopedic surgeon, and found his opinion consistent
21 with the objective record. (A.R. 27-28). Dr. Close evaluated Plaintiff on April
22 30, 2013, and found that she was not precluded from performing less than
23 light exertional capacity. (A.R. 378-381). Dr. Close reported that Plaintiff
24 was 39 years old with a workers’ compensation injury four years earlier,
25 when a chair was pulled out from under her, causing pain in her joints and
26 back. (A.R. 378). Plaintiff continued to have rheumatoid disease after her
27 workers’ compensation claim closed. (*Id.*).

1 Dr. Close's physical examination determined that Plaintiff had
2 polyarthralgia, rheumatoid arthritis, and chondromalacia patellae knees,
3 bilateral. (A.R. 380). He found that Plaintiff stood and walked with a normal
4 gait and used a cane for balance; had crepitus in both knees; had a negative
5 McMurray test³ and negative straight leg raise test; had generalized
6 tenderness in the rotator cuff bilaterally and wrists; and had a negative
7 Finkelstein test.⁴ (A.R. 379).

8 Dr. Close opined that Plaintiff "was able to lift and/or carry 20 pounds
9 occasionally and ten pounds frequently; stand and/or walk for four hours with
10 normal rest breaks; sit for six hours with normal rest breaks; use a cane for
11 balance and avoid uneven terrain and long-distance walking; frequently
12 bend, stoop, and crouch; and frequently reach, handle, feel, grasp, and
13 finger." (A.R. 381).

14 **4. Drs. Taylor-Holmes and Kalmar, State Agency Reviewers**

15 The ALJ gave less weight to State agency reviewers Dr. Taylor-Holmes
16 and Dr. Kalmar, who reviewed the record and determined Plaintiff was
17 functionally limited to sedentary work. (A.R. 28, 85-97, 113-125). The ALJ
18 noted that Plaintiff's treatment records indicated that Plaintiff had
19 rheumatoid arthritis, but negative ANA testing, and an x-ray of Plaintiff's
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22 ³ A McMurray test is a "rotation of the tibia on the femur to determine injury
23 to meniscal structures. . . . A positive test indicates meniscal injury."
24 *Rodriguez v. Astrue*, No. 12-CV-4103, 2013 WL 1282363, at *7 n.45 (E.D. N.Y.
25 Mar. 28, 2013) (internal citations and quotations omitted).

26 ⁴ The Finkelstein test is used by physicians to confirm de Quervain's
27 tenosynovitis, which is a painful condition affecting the tendons on the thumb
side of the wrist. "The thumb is bent down along the palm and then covered
with the other fingers." *Herring v. Colvin*, No. 3:13-CV-00004, 2014 WL
1052078, at *7 n.20 (M.D. Pa. Mar. 18, 2014) (internal citations omitted).

1 cervical spine showed only mild degeneration. (*Id.*). Accordingly, the ALJ
2 found that Plaintiff had a significant range of light residual functional
3 capacity assessment and was not limited to sedentary work. (*See id.*).

4 **C. Issues**

5 **1. Credibility of Plaintiff's Testimony**

6 Plaintiff's sole argument on appeal is that the ALJ failed to articulate
7 sufficient reasons to find Plaintiff not credible. (ECF No. 16-1 at 4).
8 Specifically, Plaintiff argues that the ALJ erred in using boilerplate language
9 to discredit her testimony, and in rejecting her testimony based on a lack of
10 objective evidence, which Plaintiff argues is always legally insufficient. (*Id.*
11 at 6-7). Conversely, Defendant argues that the ALJ offered substantial
12 evidence in finding Plaintiff not entirely credible. (ECF No. 19-1 at 3).

13 Plaintiff's allegation of error will not be examined here. As discussed
14 below, the Court finds that the ALJ improperly applied the res judicata
15 presumption of continuing nondisability to his standard of review in this
16 case. This constituted clear error.

17 **2. *Res Judicata* Presumption of Nondisability**

18 As noted herein, Plaintiff previously applied and was denied disability
19 benefits. (A.R. 21). Specifically, on May 16, 2011, ALJ David Wurzel ruled
20 that Plaintiff had not "been under a disability... from October 21, 2008,
21 through the date of [his] decision." (A.R. 73).

22 Ruling on the instant (second) application for disability benefits, on
23 January 14, 2015, ALJ Jay Levine found that Plaintiff had not "been under a
24 disability...from May 17, 2011 through the date of [his] decision." (A.R. 29).
25 In his decision, ALJ Levine noted that "the documentary evidence reflects the
26 claimant filed prior applications for Title II and Title XVI benefits...which
27 were denied at the initial level on December 18, 2008 and affirmed on May

1 16, 2011, following a review and hearing conducted by ALJ Wurzel. (A.R.
2 21). ALJ Levine cited to *Chavez v. Bowen*, 844 F.2d 691 (9th Cir. 1988) for
3 the proposition that “[t]he principles of res judicata apply to administrative
4 decisions. . . .” *Id.* at 693. He also cited to *Lyle v. Secretary of Health and*
5 *Human Services*, 700 F.2d 566 (9th Cir. 1983) for the proposition that “a
6 prior decision, which finds a claimant capable of a certain residual functional
7 capacity, creates a presumption that the claimant continues to be able to do
8 work at that level unless evidence is presented to overcome this
9 presumption.” (A.R. 21). Lastly, ALJ Levine acknowledged that for a
10 claimant to overcome the presumption of continuing nondisability a claimant
11 must prove ‘changed circumstances’ indicating a greater disability, an
12 increase in severity of her impairments or the existence of an impairment not
13 previously considered. (A.R. 21-22). *See Taylor v. Heckler*, 765 F.2d 872, 875
14 (9th Cir. 1985); AR 97-4(9); 20 C.F.R. 404.1563; 20 C.F.R. 416.963.

15 After citing the applicable legal standard, ALJ Levine subsequently
16 concluded:

17 In this case, the claimant has not provided any persuasive
18 evidence of significant “changed circumstances” that would warrant
19 a more restricted residual functional capacity than that described
20 [herein]. In fact, the evidence indicates that claimant is capable of
21 performing less than light exertional capacity. As such, [I find] the
claimant has not rebutted the presumption of continuing
nondisability.

22 (A.R. 22). From that conclusion, ALJ Levine proceeded to rule upon
23 Plaintiff’s second application.

24 “Normally, an ALJ’s findings that a claimant is not disabled ‘creates a
25 presumption that the claimant continued to be able to work after that date.”
26 *Vasquez v. Astrue*, 572 F.3d 586, 597 (9th Cir. 2009) (quoting *Lester v. Chater*,
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1 81 F.3d, 821, 827 (9th Cir. 1995)). “[T]he principles of res judicata apply to
2 administrative decisions,” but, “the doctrine is applied less rigidly to
3 administrative proceedings. . . .” *Id.* Consequently, when a claimant files a
4 second (or subsequent) claim for benefits, the ALJ deciding the subsequent
5 application is required to consider the res judicata effect to be accorded to
6 the prior unfavorable decision. *Lester v. Chater*, 81 F.3d, 821, 827 (9th Cir.
7 1995). Notably, “[t]he presumption [never] applies, if there are changed
8 circumstances.” *Id.* (citations omitted.) Changed circumstances that can bar
9 the application of res judicata specifically include a new issue raised by the
10 Plaintiff “such as the existence of an impairment not considered in the
11 previous application.” *Id.* (citations omitted).

12 In Plaintiff’s first application (2011) ALJ Wurtzel specifically found:

13 I find that the claimant has the following medically determinable
14 impairments that in combination are considered severe under the
15 Social Security Act and regulations: Degenerative disc disease,
16 cervical spine, with significant disc-spur complex at C6-C7;
17 degenerative disc and joint disease, lumbar spine, with disc-spur
complex at L4-L5; hypertension, well controlled; patellofemoral
pain syndrome, both knees; and obesity.

18 (A.R. 64). ALJ Wurzel’s decision does not indicate that fibromyalgia was
19 presented as a basis for Plaintiff’s claim of disability in the first application
20 or that he considered it in his findings. (A.R. 64).

21 In the application at issue here (2015) ALJ Levine found:

22 The claimant has the following severe impairments: polyarthralgia;
23 arthritis; chondromalacia patellar, bilateral knees; fibromyalgia;
24 obesity; degenerative disc and joint disease, lumber and cervical
spine; and hypertension.

25 (A.R. 24). Also, ALJ Levine specifically acknowledged Plaintiff’s fibromyalgia
26 impairment:
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1 The objective treatment records support she has a medically
2 determinable and severe impairment of fibromyalgia, based on
3 evidence showing widespread pain; at least 11 positive tender
4 points on physical examination; repeated manifestations of six or
5 more fibromyalgia symptoms; and a determination that other
disorders could not cause these repeated manifestations of
symptoms.

6 (A.R. 24).

7 The record shows that the earliest date Plaintiff was given a tentative
8 diagnosis of fibromyalgia was following an exam by Dr. Soumya Rao, M.D. on
9 August 8, 2011. (A.R. 301). The date of that exam was over four months after
10 ALJ Wurzel issued his ruling on Plaintiff's first application on May 16, 2011.
11 (A.R. 73). Thus, the Court finds that the record evidence demonstrates that
12 Plaintiff's allegation of fibromyalgia constituted a "changed circumstance"
13 because this impairment was not addressed in the 2011 decision.⁵

14 The Ninth Circuit has held that "the Commissioner may not apply res
15 judicata where the claimant raises a new issue, such as the existence of an
16 impairment not considered in the previous application." *Gregory v. Bowen*,
17 844 F.2d 664, 666 (9th Cir. 1988). "[A]ll an applicant has to do to preclude
18 the application of res judicata is raise a new issue in a later proceeding."
19 *Vasquez v. Astrue*, 572 F.3d 586, 598 n. 9 (9th Cir. 2009). The newly asserted
20 impairment need not be severe or disabling, res judicata is precluded based
21 only upon the assertion of new impairments. *Id.* Because Plaintiff raised a
22 new impairment not previously presented in her first application it was error
23 for the ALJ to apply the presumption of continuing nondisability in ruling on
24 Plaintiff's second application.

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27 ⁵ : The Court was compelled to consider the issue of res judicata without input from either
party as neither addressed it in their pleadings.

1 proceedings and the ALJ be instructed not to apply the principle of the res
2 judicata presumption of continuing nondisability. This Report and
3 Recommendation of the undersigned Magistrate Judge is submitted to the
4 United States District Judge assigned to this case, pursuant to the provisions
5 of 28 U.S.C. § 636(b)(1).

6 **IT IS HEREBY ORDERED** that any written objection to this report
7 must be filed with the court and served on all parties no later than
8 **September 12, 2017**. The document should be captioned "Objections to
9 Report and Recommendations."

10 **IT IS FURTHER ORDERED** that any reply to the objections shall be
11 filed with the Court and served on all parties no later than **September 19,**
12 **2017**. The parties are advised that failure to file objections within the
13 specified time may waive the right to raise those objections on appeal of the
14 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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16 Dated: August 29, 2017

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18 Hon. Mitchell D. Dembin
19 United States Magistrate Judge
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